# Supreme Court of the United States
**OCTOBER TERM, 1970**

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**NO. 1526**

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UNITED STEELWORKERS OF AMERICA, AFL-CIO,
*Petitioner,*

*v.*

AUBURNDALE FREEZER CORPORATION,
MINUTE MAID COMPANY, AND
NATIONAL LABOR RELATIONS BOARD.

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE OUT OF TIME BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby moves for leave to file a brief *amicus curiae* out of time in support of the Petition.

### INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred and twenty-one affiliated labor organizations having a total membership of approximately thirteen and one-half million working men and women.

In the instant case the Court of Appeals fashioned a *per se* rule prohibiting picketing to urge common carrier employees not to pick up the struck employer's goods stored

at a warehouse owned by a third person. Pet. App. pp. 5-7. This rule thwarts achievement of the basic aim of the primary strike—"halting the day to day operations of the struck employer," *Steelworkers* v. *Labor Board (Carrier),* 376 U.S. 492, 499, through an illegitimate narrowing of the ambit of primary picketing. It is based on a proposition, that there is a "real situs" of a labor dispute which is "the place for primary picketing" so that picketing at any other place is "secondary" and forbidden by § 8(b)(4)(B) of the National Labor Relations Act, that is entirely inconsistent with this Court's decisions since *Electrical Workers* v. *Labor Board (General Electric),* 366 U.S. 667, 674-681.

The Act directs management and labor to make their own bargain; it "does not attempt to control the results of negotiations." *Labor Board* v. *Insurance Agents,* 361 U.S. 477, 488. In this process "economic force" is recognized as a "prime motive power for agreement" and there is no doubt that "negotiation positions are apt to be weak or strong in accordance with the degree of economic power the parties possess" (361 U.S. at 489). The decision below severely restricts the use of labor's "major [economic] weapon . . . primary picketing" (*Carrier,* 376 U.S. at 499). The profound interest of the Federation is therefore manifest.

## REASONS FOR GRANTING THE MOTION

The request to file the attached Brief *Amicus,* and the reason for filing it out of time, are due to a single cause: the submission by the National Labor Relations Board of a Memorandum which, while agreeing with the Union that the decision below is wrong, nevertheless opposes review to correct that error.

At the time that the Union filed its Petition, no brief *amicus* appeared necessary. The propriety of certiorari seemed obvious: the Court of Appeals itself had recognized the "supreme public importance" of the case (Pet. App. p. 5), the majority opinion declared a *per se* rule based on

the doctrine, contrary to the settled law in this Court, that there is a single "real situs" of a labor dispute which is "the place for primary picketing" (Pet. App. p. 6); Judge Wisdom had written a careful and comprehensive dissenting opinion; and the underlying Board decision was a model of the reasoned exposition which this Court requires of administrative agencies. The Union was therefore able to fully and fairly state the reasons for granting the writ in a concise presentation limited to four pages. Under these circumstances a brief *amicus* in support of the Petition seemed superfluous, an imposition on this Court, contrary to the spirit of Rule 42 (1).

But the filing of the Memorandum in Opposition by the Board altered the posture of this case. Board counsel's views as to the propriety of review in one of the Board's own cases inevitably carry weight with this Court, particularly in gauging the importance of the issue presented. And it is precisely because the Memorandum in Opposition may tend to create substantial, albeit unwarranted, doubt as to the propriety of review, when there could be none before, that we deem it necessary to take the unusual step of seeking leave to file a brief *amicus* in support of the Petition, and to do so out of time. We seek this opportunity to rebut that Memorandum in order to demonstrate that its argument is undermined by two fatal defects. Briefly stated they are:

First, while asserting "that the Court below erred in reversing the Board" (Mem. p. 4), the Memorandum fails to give the Board's reasoning its full due. It does not quote, or otherwise refer to, the Board's basic conclusion that picketing took place at a location which "constitutes an integral part of the [struck employer's] production process." Pet. App. p. 22. Moreover, it goes so far as to venture a distinction of the very precedents in this Court which the Board itself followed in its decision. Compare Mem. p. 4 n. 4 with Pet. App. p. 21 n. 7 and p. 23 n. 11. We submit that even as appellate counsel cannot save the

decisions of administrative agencies by post-hoc rationalizations, (cf., *Burlington Truck Lines* v. *ICC*, 371 U.S. 156, 168, followed in *Metropolitan Life Ins. Co.* v. *Labor Board*, 380 U.S. 438, 444) they should not be heard to scuttle them by such means.

Second, the Memorandum argues that the decision of the court below rests on its "particular facts" (Mem. p. 4 n. 5). While as an effort to limit the impact of that decision this may be an understandable litigation strategy, and while the Board itself in its decision-making process may henceforth treat the court's decision as a "derelict up the waters of the law," *Lambert* v. *California*, 355 U.S. 225, 232 (Frankfurter J., dissenting), the opinion does not permit a restrictive reading. See the Argument, pp. 5-8, *infra*. Moreover, whatever the Board may choose to do in its own decisions, the District Courts in the Fifth Circuit are bound by the ruling below in the exercise of their coordinate jurisdiction to enforce § 8(b)(4) of the Act in suits for damages under § 303. The right of unions to engage in what this Court has held to be protected primary activity is thus subject, at least in that Circuit, to the substantial sanction of damage suits, even if the Board would not issue unfair labor practice complaints and seek injunctions against the same picketing.[1]

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[1] But cf. *Samoff* v. *Oil, Chemical & Atomic Workers*, 307 F.Supp. 434 (D. Del. 1969), where the Board's general counsel pressed for a 10(1) injunction on facts identical to those of the present case even after the Board's decision herein, notwithstanding the admonition of *McLeod* v. *Local 459 I.U.E.*, 300 F.2d 237, 241-242 (C.A. 2, Marshall, J.). The District Court denied the injuction, stating that the "Board's conclusion concerning the primary character of the picketing in *Auburndale* seems consistent with the principles recognized in the *General Electric* and *Carrier* cases," 307 F.Supp. at 439.

## CONCLUSION

For the above-stated reasons, this motion to file the accompanying brief *amicus* in the instant case in support of the Petition should be granted.

Respectfully submitted,

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May, 1971

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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This Brief *Amicus Curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) contingent upon the Court's granting the foregoing Motion For Leave To File A Brief As *Amici Curiae* Out Of Time.

The opinions below, the basis of this Court's jurisdiction, the question presented, and the statutory provisions involved are set out on pp. 1-2 of the Petition.

The interest of the AFL-CIO is set out on pp. I-II of the above-noted Motion.

## ARGUMENT

### THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH DECISIONS OF THIS COURT, FOR IT RESTS ON THE DISCREDITED THEORY THAT THERE IS A "REAL SITUS" OF A LABOR DISPUTE AT WHICH ALONE PRIMARY PICKETING IS LAWFUL.

The question in this case is whether picketing by striking employees to urge common carrier employees not to pick up the struck employer's goods stored at a warehouse owned by a third person, where the storage "constitutes an integral part of the [struck employer's] production process" (Pet. App. p. 22), is primary activity protected by §§ 7 and 13 of the National Labor Relations Act.

The majority of the Court of Appeals answered this question in the negative.

It held that the Union violated § 8(b)(4)(B) by picketing at the Auburndale warehouse in support of its dispute with the struck employer, Cypress, because Auburndale was not the "real" or "true" situs of the dispute. It reasoned as follows:

> "There was no strike against Auburndale or Minute Maid or against the nineteen other employers who stored their products at that warehouse.
>
> "The processing plant of Cypress, five miles from Auburndale, was, of course, struck and picketed. That is where the employees of Cypress processed the citrus. That was the real situs of both the dispute and the strike. That was the place for primary picketing. No Cypress employees were at work at Auburndale, and never had been.
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> • • •
>
> "We hold that the real, indeed the only substantial, object for the picketing at Auburndale, by means of a picket line away from the true situs of the controversy, was to shut down operations at a frozen food storage warehouse in which the stored products of the primary

employer then constituted only 5% of the total capacity of the facility and could never have exceeded ten per cent." (Pet. App., pp. 6, 7.)

1. The proposition that there is a "real situs" of a labor dispute which is "the place for primary picketing," so that picketing at any other place is "secondary" and forbidden by § 8(b)(4)(B), is entirely inconsistent with the decisions of this Court. *Electrical Workers* v. *Labor Board (General Electric)*, 366 U.S. 667, 674-681; *Steelworkers* v. *Labor Board (Carrier)*, 376 U.S. 492, 496-500; *Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 387-390; *NLRB* v. *Operating Engineers*, 400 U.S. 297, 303-304. For a limitation on the right to engage in picketing, such as was declared by the majority below, fails to take into account the truth that the "primary strike . . . is aimed at applying economic pressure by halting the day-to-day operations of the struck employer" (*Carrier*, 376 U.S. at 499). To achieve that end it is necessary to shut down the struck employer's entire production process from its start, the receipt of raw materials, to its completion, the delivery of the finished goods. A strike is effective only to the extent that it prevents the employer from continuing to reap profits from the struck operation. This generally requires, both appeals not to work to those who would substitute their labor for that of the strikers, and appeals not to provide the struck employer with direct assistance to those who would deliver goods to the employer or make pickups from him. Thus, "appealing to neutral employees whose tasks aid the employer's everyday operation . . . [is a] traditional primary activity" (*General Electric*, 366 U.S. at 681).

This Court has, therefore, squarely held that "Congress intended to preserve the right to picket during a strike a gate reserved for employees of neutral delivery men furnishing day-to-day service essential to the employer's regular operations" (*Carrier*, 376 U.S. at 499).

*Carrier* was decided in the context of picketing at a railroad gate adjacent to a struck plant aimed at halting

deliveries to that plant. The rule there announced is not, however, limited to these precise facts. Pickups of the struck employer's finished goods are as integral to his attempt to operate in the face of a strike as the receipt of deliveries. Moreover, the incidental secondary effects of both forms of picketing are indistinguishable. Thus *Steelworkers* v. *NLRB (Phelps Dodge)*, 289 F.2d 591 (C.A. 2), approved in *General Electric*, 366 U.S. at 681, as stating the "controlling considerations," expressly holds that unions may direct their picketing at "employees . . . coming to deliver or pick up the ordinary raw materials and products of the [struck] business." 289 F.2d 594

Moreover, it is clear from *Jacksonville Terminal*, which characterized *General Electric* and *Carrier* as cases which govern "common situs picketing" (394 U.S. at 389), that those decisions cannot be explained away as dealing only with picketing at or near the primary employer's plant. The argument of counsel to that effect (Mem. p. 4, n. 4) is also inconsistent with the decision of the Board. For after the Trial Examiner had ventured precisely that distinction (Pet. App. pp. 31-33), the Board not only reversed his conclusion but relied on *General Electric* and *Carrier* to validate the picketing. "The key" to the functional rule evolved in *General Electric*, and reaffirmed in *Carrier*, is "the type of work" which the secondary employees are being "solicited not to perform (366 U.S. at 680). Where a portion of the struck employer's "normal business operations" takes place away from his plant a rule which insulates that site from picketing directed at employees "whose tasks aid the employer's everyday operations" (*General Electric*, 366 U.S. at 681) would frustrate the central aim of the legitimate primary strike—to halt "all phases of the [struck employer's] normal operations" (*Operating Engineers*, 400 U.S. at 304). And it would do so without furthering any substantial legitimate interest; for the effect on third persons of picketing directed solely at those "whose tasks aid the employer's everyday operations," to induce them not to

perform those tasks where that operation is located away from the plant, is indistinguishable from the effects of such picketing at the employer's plant.

The view that there is a situs at which alone picketing is permissible gained brief currency at the Labor Board where it was known as the *Washington Coca-Cola* (107 NLRB 299) doctrine. That doctrine was uniformly disapproved by the courts, most notably in the opinion of Judge Rives in *NLRB* v. *General Drivers,* 255 F.2d 205 (C.A. 5), and of Judge Fahy in *Sales Drivers* v. *NLRB,* 299 F.2d 514 (C.A.D.C.). As the court pointed out in *General Drivers,* the defect in *Washington Coca-Cola* was that the:

> "ultimate and controlling statutory inquiry . . . whether the unlawful objective denounced by the statute actually existed . . . may [not] be effectually supplanted merely by Board findings that the real 'situs' of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be 'adequately' publicized with impunity under the Act. . . ." 225 F.2d at 209, quoted with approval in *Sales Drivers,* 229 F.2d at 518.

*General Electric* completed the process of extirpating reliance on the "location of the picketing" as a "decisive factor" (*Carrier,* 376 U.S. at 499) begun in *General Drivers* and *Sales Drivers. General Electric* disapproved the theory of such cases as *United Electrical Workers (Ryan Construction Corp.),* 85 NLRB 41, that all picketing at the employer's home plant is perforce primary picketing. As noted, p. 4, *supra,* it did so on the basis that "the key to the problem" is the "type of work" which the secondary's employees are being solicited not to perform (366 U.S. at 680). Contrary to *Washington Coca-Cola,* therefore, the location of the picketing cannot serve to make that which is "primary" under the proper functional test "secondary," and contrary to *Ryan Construction,* the location of the picketing cannot make that which is "secondary" under that test "primary."

Thus as *Carrier* shows, while location continues to be "important" as an evidentiary aid in determining the picketing union's objective after *General Electric* it cannot override a showing that the common carrier's "operations for the [struck employer] were in furtherance of [that employer's] normal business;" that the picketing was directed at bringing that assistance to the struck employer to a halt and not to interference with the carrier's operations for other employers; that "the picketing was designed to accomplish no more than picketing outside the entrance [to the struck plant] might have accomplished;" and that "there was no other place where the union could have brought home to the . . . workers servicing [the struck employer] its dispute with [the struck employer]," (*Carrier*, 376 U.S. at 499-500).

In short, the reasoning of the opinion below tends to undermine the achievements of a decade. Unless the decision below is reversed, it is certain to stimulate a new cycle of litigation before the Board and the lower courts over issues which this Court justifiably regarded as settled even when it decided *Carrier*.

2. The Board's Memorandum disagrees with the Court of Appeals' characterization of the importance of the case, and asserts that "a reading of its opinion as a whole indicates that the decision rests on the particular facts, as does the Board's decision (see n. 2, *supra*)." (Mem. p. 4, n. 5.) While this attempt to limit the decision below to its facts jibes with Board counsel's litigation strategy (see Motion, p. IV, *supra*), no such narrowing construction is permissible. Of course, it is simply misleading to suggest that since the Board had based its decision dismissing the complaint on a careful evaluation of the circumstances, the decision below reaching the opposite conclusion was likewise grounded on the particular facts of the case. If counsel's argument is intended to imply that the Board's decision was insignificant, it is contrary to the Board's own assessment in its report to Congress. See Thirty-Fourth Annual Report of

the National Labor Relations Board, pp. 22-26, where *Auburndale Freezer* is one of eight "Decision Highlights" of fiscal year 1969, selected for special mention as "establishing basic principles." The impact and importance of the principle established by the Court of Appeals is even greater, since its reasoning is more generalized and applies to *any* picketing at an independent warehouse where the goods of a primary employer are stored.

The Court of Appeals' holding cannot be narrowed by attributing to its majority the reasoning of the dissenting members of the Board (Mem. p. 3). For it is clear that the portions of the court's opinion, which the Memorandum selectively quotes (Pet. App. pp. 3-4, 5), constitute the exposition of the case rather than the holding, which is contained in the passages quoted at the outset of our Argument, p. 2-3, *supra*.[2]

Indeed, a basic deficiency of the Court of Appeals' reasoning is its failure to deal with the facts on which the Board had based its decision or even to discuss the critical conclusion which the Board derived from those facts:

> "These facts indicate that the concentrate, while stored at the Auburndale warehouse, is, for all practical purposes, under the control of Cypress, that the warehouse is the place where common carriers receive Cypress goods for delivery to Cypress' customers, that there is substantial contact between Cypress, its employees, and the Auburndale warehouse and, that the storage of the concentrate at the warehouse, which practice has been continuous since 1956, *constitutes an integral part of the Cypress production process.* To the extent that the Auburndale warehouse is a part of the Cypress operation, we conclude that the warehouse constitutes a common situs." (Pet. App. p. 22, emphasis added.)

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[2] While we are in complete disagreement with both the reasoning and the result of the opinion below, we acknowledge that the lower court makes quite clear what it is deciding. The statement of the case, the statement of the issue, the quotations of the statute, the majority's reasoning, and the statement of the result follow in clear and unmistakable progression.

Finally it should be noted that no narrower rule of law than that so plainly announced would have achieved the result which the court below deemed essential—to protect "public warehouse operator[s] and other employers who use [their] facilities" from "picketing at any time a labor organization engages in a dispute with any employer who happens to be a customer of the warehouse," (Pet. App. pp. 5-6). And the lower court's rationale undoubtedly achieves such broad protection for warehousemen, and concomitantly such direct inhibition of primary strike activity by employees whose employers choose to store their goods temporarily on another's property.

It is thus a further ground for review by this Court that the Court of Appeals has substituted its own economic predilections for the adjustment of interests adopted by Congress which made it "clear that secondary employers are not necessarily protected against picketing aimed directly at their employees," *Jacksonville Terminal Co.*, 394 U.S. at 389, following *General Electric* and *Carrier*.

In sum, it is inescapable that the decision below rests on the theory that there is a "real" or "true situs" of a dispute and that picketing away from that situs is necessarily "secondary" and forbidden by § 8(b)(4)(B). It is therefore a throwback to the approach to § 8(b)(4) which has long been thoroughly discredited. As was observed in *Jacksonville Terminal*, "the common law of labor relations has created no concept more elusive than that of 'secondary' conduct" 394 U.S. at 386; consequently, judges were able to decide individual cases by "intermixing metaphysics with their notions of social and economic policy" (*id.*). It is therefore particularly essential that the lower courts be closely confined to the methods of analysis which this Court has determined, after mature deliberation, best serve the balance struck by Congress. This Court's decisions, beginning with *General Electric*, direct the lower courts and the Board, in determining the legality of appeals addressed directly to a secondary's employees, to focus their inquiry

on the "nature of the work performed." Since the decision below fails to heed this teachings and instead repeats the errors of the past in a critical and much litigated area of labor relations, it should not be permitted to stand.

## CONCLUSION

For the above-stated reasons, as well as those stated in the Petition, the Petition For A Writ Of Certiorari should be granted.

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